



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Confidential Status of
Information Submitted by Chief Waste Treatment
Corporation

Case No.: IH-00-08

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Chief Waste Treatment Corporation (Chief), has requested that the Department of Natural Resources (Department or DNR) designate that certain information regarding its operation in Ripon, Wisconsin be treated as confidential. Chief is a centralized wastewater treatment facility which collects wastewaters from various client industries, treats these wastes to Department established standards and discharges the effluent to the Ripon publicly owned treatment works.

The Department issued a public notice dated September 12, 2000 of preliminary decision to grant confidential status of information submitted by Chief regarding the listing of individual customers and waste shipments under Wis. Stat. § 283.55, and to withhold this information from the public on the basis that the information constitutes a trade secret.

On September 29, 2000, the Department received a request for a public hearing from William Schweda, Vice President, ECI, pursuant to Wis. Admin. Code § NR 2.19. On November 3, 2000, the Department granted the request for public hearing.

On November 14, 2000, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held at Green Lake, Wisconsin on January 30, 2001, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with Wis. Stat. § 227.47 and 227.53 (1)(9c), the PARTIES to this proceeding are certified as follows:

Chief Waste Treatment Corporation, by

Attorney Earl J. Luaders
110 North Water Street
New London, WI 54941

Wisconsin Department of Natural Resources (WDNR or the DNR), by

Attorney Dan Graff
P. O. Box 7921
Madison, WI 53707-7921

ECI Special Waste Services, Inc., by

William Schweda, Vice President
P. O. Box 2166
Fond du Lac, WI 54936-2166

FINDINGS OF FACT

1. Chief Waste Treatment Corporation (Chief), 625 South Douglas Street, Ripon, Wisconsin, 54971, requested that the Department of Natural Resources designate that certain information regarding its operation in Ripon, Wisconsin, be treated as confidential.
2. The DNR issued a public notice dated September 21, 2000. Notice of a preliminary decision to grant confidential status of information submitted by Chief regarding the listing of individual customers and waste shipments pursuant to Wis. Stat. § 283.55. The DNR made a preliminary determination to withhold this information from the public on the basis that the information constitutes a trade secret.
3. On September 29, 2000, the DNR received a request for a public hearing from William Schweda, Vice President, ECI Special Waste Services, Inc. (ECI), pursuant to Wis. Admin. Code § NR 2.19, seeking a hearing on the determination to deem the information a trade secret.
4. The petition of Chief signed by Joseph Roehrick, President, sought trade secret confidential status for the following reasons:
 - a. To protect its clients from solicitation calls from competitors who had obtained the name of Chief customers from DNR files;
 - b. To protect the company from competing firms using WDNR files as “shopping lists”, and;
 - c. To put the company on a level playing field with other competitors in the industry who have confidential agreements with their respective control authorities.

5. There is no dispute in the record that Chief is at something of a competitive disadvantage because its customer list must be reported as a condition of its regulation by the DNR. Chief is a centralized wastewater treatment facility which collects wastewaters from various client industries, treats those wastes to DNR established standards and then discharges the effluent to the Ripon publicly owned treatment works. The Ripon publicly owned treatment works (POTW) is not a designated treatment works under the Wisconsin regulatory scheme. Most other centralized wastewater treatment facilities discharge to larger POTW's that have a pretreatment program and which are designated by the DNR as the control authority. On the whole, designated municipal POTW's do not require the names of the waste generators to be a public record. The DNR does require the names of generators pursuant to Wis. Admin. Code § NR 211.16(5)(a).

6. Chief is a newly established in the business of centralized wastewater treatment, although it has ties to the long-established Chief Liquid Waste Company that has for 26 years hauled such waste in the State of Wisconsin. Chief Waste Treatment has been in business as a centralized waste treater for a little over two years. (Roerhrick)

7. Prior to the establishment of Chief Waste Treatment, Chief Liquid Waste Company did a substantial amount of business with the objector in this proceeding, ECI. To some extent the parties agree that the waste treatment business is highly competitive by its very nature. This is in part because there are only five or six companies in the State which undertake centralized industrial wastewater treatment.

8. The first issue is whether the customer list in and of itself constitutes a trade secret within the meaning of Wisconsin law. Wis. Admin. Code § NR 2.19, governs requests for confidential status and sets forth a four-prong test for information to be so treated. The first prong was established by Chief, namely that very few individuals within the company have access to the customer list of Chief. Joseph Roehrick, President of Chief Waste Treatment, testified that only three Chief employees were given access to the customer lists because of their confidential nature. Public disclosure of customer lists would be likely to increase that number to a significant degree.

9. The second prong relates to whether the contested information has value to the possessor or to a competitor. All parties agreed that the customer list had value to Chief and that it has potential value to competitors. Because the clients of Chief include one or more large contracts in excess of \$100,000.00, the value of the information is substantial. Roehrick testified that it had taken many years for Chief to develop its customer base. Of approximately 13,000 manufacturing businesses in the state, only 50 to 100 use the services of Chief. Knowledge of the names of these firms would be an asset to any competitor.

10. The third prong relates to what damage, if any, that the possessor of the secret would suffer from disclosure and what advantages competitors would reap from disclosure. The record is fairly mixed on these points. The competitor has attempted to recruit clients of Chief but has been unsuccessful in doing so. As of the time of the hearing, there had been no damage of any kind to the economic interest of Chief as a result of efforts by ECI to entice its customers

to switch wastewater treatment companies. However, there is no question that competitors would be in a better position to win contracts if they knew the names of Chief customers and if they were able to directly solicit the generators in possession of all the information in Chief's DNR file. Accordingly, Chief has met the third prong of the test for trade secret status.

11. The fourth prong of the trade secret test relates to what benefits are likely to flow from disclosure and to who are they significant and what is the public need for disclosure. Can it be satisfied in any other way? ECI argues that a competitor can act as "a second set of eyes" in determining whether the centralized wastewater treatment company is fully compliant with the State regulatory scheme. (Schweda) DNR State-wide Pretreatment Coordinator, Charles Schuler, agreed that there could be some public benefit from a competitor or other member of the public acting as a second set of eyes. While the objector specifically argues that a competitor is likely to provide input beneficial to the public interest, the point extends to other groups and individuals as well.

12. Balancing Chief's interest in maintaining its client list with the public interest in oversight, some presumption of confidentiality is in order. As noted, most municipalities do not require disclosure of the names of generators. The DNR will have access to these names. Chief has further agreed that its confidentiality concerns would be satisfied if only the names of the generators were redacted. The public would then still have ready access to all of the other information in Chief's DNR file, including the amounts treated and the type of waste. (See: Ex.1) Accordingly, it is appropriate to grant confidential status so long as some provision is made for disclosure when a competitor or any other member of the public has a good faith reason to believe that the terms and conditions of a permit or some other activity detrimental to the public interest in public surface water or groundwater has occurred.

DISCUSSION

Chief Waste Treatment Corporation established that its customer list is a trade secret within the meaning of Wis. Stat. § 134.90(1)(d). ECI was persuasive that public access to generator lists could be important in the event a person or group has reason to believe the company is not treating wastes lawfully. From the record at hearing, there is no reason to believe that Chief Waste is operating in anything but a lawful and appropriate manner.

Under these circumstances, there should be a presumption of confidentiality. Competitors should not be allowed to know the names of Chief Waste customers unless they have reason to do so other than mere competitive self-interest. The condition allowing public disclosure of the names of generators is not limited to competitors, but includes any group or individual that has a reasonable belief that the public interest is implicated.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and enter necessary orders relating to confidential status determinations pursuant to Wis. Stat. § 227.43 and Wis. Admin. Code ch. NR 2.19. A request may be granted "in whole or in part."

2. Trade secret means information, including a formula, pattern, compilation program, device, method, technique or process to which all of the following apply:

The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances. Wis. Stat. § 134.90(1)(d).

The client list meets the above definition.

3. The Division has authority to set such terms and conditions on the confidential information as are necessary to protect the confidential information and the wider public interest. Wis. Admin. Code § NR 2.19(6)(c). The conditions set forth are reasonable and necessary after consideration of the questions set forth in Wis. Admin. Code § NR 2.19(5)(c)(1-4).

ORDER

Wherefore IT IS HEREBY ORDERED that the request for confidential status be granted, subject to the condition described below;

IT IS FURTHER ORDERED that, any person requesting access to the file of Chief Waste will be given copies with the names of generators redacted. Upon a showing to the DNR that any person or group has reason to believe that Chief Waste is not properly treating wastes or is in violation of the terms of any permit or other legal requirement, the names of the particular generators shall be made available to the requesting party.

Dated at Madison, Wisconsin on February 27, 2001.

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DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.